SUPERINTENDENT OF LANDS & SURVEYS, BINTULU

v.

NOR ANAK NYAWAI & ORS AND ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
RICHARD MALANJUM JCA
HASHIM YUSOFF JCA
TENGKU BAHARUDIN SHAH JCA
[CIVIL APPEAL NOS: Q-01-42-2001 & Q-02-504-2001]
8 JULY 2005

LAND LAW: *Customary land - Claim for native customary rights over land - Whether natives were in continuous occupation of land - Whether there was evidence to show continuous occupation of land*

The appellant in the first appeal was land alienating authority for the region of Bintulu, Sarawak. In the second appeal, the first appellant was the entity to which the appellant in the first appeal had alienated two parcels of the land. The second appellant in the second appeal was the sub-lessee of the alienated land. The respondents in both appeals were the same group of people. Both appeals arose from a civil suit concerning native customary rights claimed by the respondents over a part of the alienated land – the Disputed Area. At first instance, the High Court declared the respondents entitled to exercise native customary rights over the Disputed Area and injuncted the appellants and/or their servants or agents from entering into the Disputed Area. The appellants appealed. The respondents cross-appealed against the failure of the High Court to award them damages.

Held (allowing the appeal)
Per Hashim Yusoff JCA:

[1] The common feature which forms the basis of a claim for customary rights is the continuous occupation of land. The claim should not be extended to areas where the natives used to roam to forage for their livelihood in accordance with their tradition. Such view is logical as otherwise it may mean that vast areas of land could be under native customary rights simply through assertions by some natives that they and their ancestors had roamed or foraged the areas in search for food. (pp 570 g-h & 571 a)

[2] Despite the aerial photographs of the Disputed Area in 1951 showing the Disputed Area covered with jungles, the High Court Judge factually concluded that on a balance of probabilities the Disputed Area was the area where the respondents and their ancestors had cleared for cultivation, accessed for fishing, hunting and to gather forest produce, all rights associated with 'temuda' and 'galau' and they came within the 'pemakai menoa' of the respondents. However such finding was made in complete disregard to the unchalleged testimony. The Court of Appeal was unable to agree with the High Court. The court was inclined to accept, in the absence of any evidence to the contrary, that at the relevant time the Disputed Area was covered with jungles as shown in the 1951 photographs. The finding of the High Court Judge was not a primary finding of fact but an inference at most. (pp 573 f-h & 574 a-b)

[3] On the facts, there was no evidence to show that the Disputed Area was in fact under continuous occupation by the respondents and their ancestors. In the instant appeals, there were self-serving testimonies by some of the respondents which ought to have carried little or no weight in the absence of some other credible corroborative evidence. Further, the question as to whether the respondents and their ancestors in fact went to the area to forage for food remained unanswered. (p 574 c-h)

[4] On the basis that the Disputed Area was covered with jungles in 1951, with no evidence of 'temuda' or 'pulau' or 'pemakai menoa' having been credibly established, the claim for the area to be under native customary rights was a non-starter. The appeals ought to be allowed and the cross-appeal dismissed. (p 575 a-b)

*[**Bahasa Malaysia** Translation Of Headnotes*

Perayu dalam rayuan pertama di sini adalah pihak berkuasa yang meluluskan tanah bagi daerah Bintulu, Sarawak. Dalam rayuan kedua, perayu pertama adalah penerima dua bidang tanah yang diluluskan oleh perayu dalam rayuan pertama. Perayu kedua dalam rayuan kedua pula adalah pemajak kecil tanah-tanah yang diluluskan itu. Responden-responden dalam kedua-dua rayuan adalah orang-orang yang sama. Kedua-dua rayuan berbangkit dari satu guaman sivil berhubung hak-hak adat anak watan yang dimulai oleh responden-responden atas sebahagian tanah yang diluluskan – Kawasan Dipertikai. Di perbicaraan, Mahkamah Tinggi mengisytiharkan bahawa responden-responden berhak melaksanakan hak-hak adat anak watan ke atas Kawasan Dipertikai dan menghalang perayu-perayu dan/atau wakil-wakil atau ejen-ejennya dari

memasuki Kawasan Dipertikai. Perayu merayu dan responden-responden merayu balas terhadap kegagalan Mahkamah Tinggi mengaward gantirugi kepada mereka.

Diputuskan (membenarkan rayuan)
Oleh Hashim Yusoff HMR:

[1] Ciri umum yang membentuk asas tuntutan hak adat adalah bahawa tanah diduduki secara berterusan. Tuntutan tidak harus diperluaskan sehingga merangkumi kawasan-kawasan yang pernah dirayau oleh anak-anak watan bagi memenuhi keperluan hidup yang bersesuaian dengan tradisi mereka. Pendapat sebegini adalah logik kerana, jika tidak, banyak tanah-tanah yang mungkin akan tertakluk kepada hak adat anak watan semata-mata kerana tanah-tanah tersebut pernah dirayau atau dikembarai oleh nenek moyang mereka untuk mencari sumber makanan.

[2] Walaupun wujud gambar dari udara pada tahun 1951 yang menunjukkan Kawasan Dipertikai sebagai diliputi hutan belantara, rumusan fakta hakim Mahkamah Tinggi adalah bahawa Kawasan Dipertikai, atas imbangan kebarangkalian, adalah kawasan yang diterokai oleh responden-responden dan nenek moyang untuk bercucuk tanam, memancing, memburu dan mengumpul hasil-hasil dan yang berkaitan dengan hak-hak 'temuda' dan 'galau' dan 'pemakai menoa'. Dapatan ini dibuat dengan membelakangi sepenuhnya keterangan-keterangan yang tidak dicabar. Mahkamah Rayuan dengan itu tidak bersetuju dengan Mahkamah Tinggi. Mahkamah lebih cenderung untuk menerima, memandangkan tiada keterangan sebaliknya, bahawa Kawasan Dipertikai pada waktu material adalah diliputi hutan sebagaimana yang terlihat dari gambar-gambar tahun 1951. Dapatan hakim Mahkamah Tinggi di sini secara intinya bukanlah dapatan fakta tetapi hanyalah suatu inferens.

[3] Berdasarkan fakta, tiada keterangan yang menunjukkan bahawa Kawasan Dipertikai telah diduduki secara berterusan oleh responden-responden dan nenek moyang mereka. Dalam rayuan-rayuan semasa, terdapat keterangan untuk manfaat sendiri oleh beberapa responden yang sepatutnya memberi kesan minimal atau langsung, tetapi tidak mempunyai apa-apa nilai, oleh kerana tiadanya keterangan-keterangan sokongan terhadapnya. Selain itu, persoalan sama ada responden-responden dan nenek moyang mereka sesungguhnya telah memasuki kawasan berkenaan untuk mencari bahan-bahan makanan masih belum dijawab.

[4] Memandangkan Kawasan Dipertikai diliputi hutan pada tahun 1951, dan ketiadaan bukti tentang kewujudan 'temuda' atau 'pulau' atau 'pemakai menoa', maka tuntutan bahawa tanah berkenaan tertakluk kepada hak adat anak watan adalah tidak berasas sama sekali. Rayuan harus dibenarkan dan rayuan balas harus ditolak.

Case(s) referred to:

Adong Kuwau & Ors v. Kerajaan Negeri Johor & Anor [1997] 1 MLJ 418 ***(refd)***
Anvest v. Wong Siew Chong [1998] 2 CLJ 245 CA ***(refd)***
Calder v. A-G (British Columbia) [1973] SCR 313 ***(refd)***
China Airlines Ltd v. Maltran Air Corp Sdn Bhd [1996] 3 CLJ 163 FC ***(refd)***
Johnson v. M'Intosh 21 US (8 Wheat) 543 ***(refd)***
Kerajaan Negeri Johor & Anor v. Adong Kuwau & Ors [1998] 2 CLJ 665 CA ***(refd)***
Mabo & Ors v. State of Queensland & Anor [1986] 64 ALR 1 ***(refd)***
Mabo (No 2) [1992] 175 CLR 1 ***(refd)***
Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors [1998] 1 CLJ 793 FC ***(refd)***
R v. Van der Peet [1996] 2 SCR 507 ***(refd)***
Sagong Tasi & Ors v. Kerajaan Negeri Selangor & Ors [2002] 2 CLJ 543 HC ***(refd)***
The Wik Peoples v. Queensland [1996-97] 187 CLJR 1 ***(refd)***
Western Australia v. Ward; Attorney-General (NT) v. Ward; Ningarmara v. Northern Territory [2002] HCA 28 ***(refd)***
Worcester v. State of Georgia 31 US (6 Pet) 515 ***(refd)***

Legislation referred to:

Land Classification Ordinance 1948, s. 8(3), (4)
Land Settlement Ordinance 1933, s. 66

For the appellant in the 1st appeal - JC Fong (Jonathan Sully & Kezia Daim with him)
For the appellants in the 2nd appeal - Tan Thiam Teck; M/s Reddi & Co
For the respondents - Baru Bian (See Chee How, Harrison Ngan & Paul Raja with him); M/s Baru Bian

[Appeal from High Court, Kuching; Suit No: 22-28-99-1]

Reported by Andrew Christopher Simon

JUDGMENT

Hashim Yusoff JCA:

Introduction

There are two appeals by the appellants (the defendants in the court below) and a cross-appeal by the respondents (the plaintiffs in the court below) before us which originated from one civil suit.

At the commencement of the hearing it was agreed by all parties that they should be heard jointly due to the common issues to be determined.

In the first appeal (Q-01-42-2001) the appellant is the land alienating authority for the region of Bintulu Sarawak. In the second appeal (Q-02-504-2001) the first appellant is the entity to which the appellant in the first appeal had alienated two parcels of land ('the alienated land') for the purpose of planting trees to feed a planned pulp and paper mill. The second appellant is the sub-lessee of the alienated land.

These appeals are against the decision of the High Court Kuching allowing the claim of the respondents with the following words:

> As the plaintiffs are entitled to exercise native customary rights over the disputed area there will be and I do make a declaration that the plaintiffs are entitled to exercise native customary rights in the disputed area. Since the first and second defendants are not entitled to enter into the disputed area there will be an injunction against them and their servants or agent not to do so from henceforth. As for damages claimed, there is insufficient evidence to support the award of any sum and I therefore make no order for damages. Consequent upon my findings, the title issued to the first defendant which included the disputed area is declared void and I expect the third defendant to take the necessary steps to rectify the title so as to exclude the disputed area from the grant and the disputed area is to be reckoned by reference to the map admitted in evidence as P172, following as closely as possible the boundary of the disputed area that has been marked on the map. There will be costs to the plaintiffs against all the defendants.

The appellants are dissatisfied with the findings and conclusions of the High Court and have submitted several grounds before this court with the view to setting aside the orders made.

Meanwhile the respondents had also filed a cross-appeal mainly on the failure of the High Court to award damages after finding for the respondents.

Agreed And Undisputed Fact:

At the court below the parties agreed to a statement of agreed facts as follows:

1. The 1st and 2nd Defendants are companies incorporated in Malaysia under the Companies Act, 1965, having their respective registered office at 5th Floor, Crown Towers, No. 88, Jalan Pending Kuching.

2. The 1st Defendant has been issued with a provisional lease over all that parcel of land situate in the Batu Kapal Land District and known as Lot Number 591 containing approximately 8,854 hectares (hereinafter referred to as "Lot 591") and a provisional lease over all that parcel of land situate

in the Sangan Land District and known as Lot Number 126 containing approximately 12,673 hectares (hereinafter referred to as "Lot 126"). Both Lots 591 and 126 shall hereinafter collectively be referred to as "the said Lands".

3.1 Both the aforesaid provisional leases over the said Lands were:

(a) for a term of 60 years each on the 16th day of May 1997 issued to the 1st Defendant subject to the provisions of Land Code (Sarawak) [Cap. 81] and to the conditions stated therein;

(b) registered at the Bintulu Land Registry Office on the 16th day of May, 1997.

3.2 The boundary of the area over which the Plaintiffs and those whom they claim to represent claim to have acquired native customary rights and part of the boundaries of Lot 591 and Lot 126 as shown in the topographical map of 1:50,000 scale found at page 172 of the Bundle of Agreed Documents filed herein are accurate.

4. By a Memorandum of Sublease dated the 19th day of June, 1997 registered at the Sibu Land Registry Office and the Bintulu Land Registry Office on the 8th day of November, 1997 and the 9th day of September, 1997 respectively, the 1st Defendant let inter alia, the said Lands to the 2nd Defendant.

5. a. The area over which the Plaintiffs and those whom they claim to represent claim to have acquired native customary rights over is more particularly set out in the map marked "A" and annexed to the Statement of Claim herein and edged in red (hereinafter referred to as "the LAND").

b. By virtue of Sarawak Government Gazette No. 1433 dated the 19th November, 1954, part of the LAND which is located within the boundaries coloured yellow as shown in the map annexed hereto and marked as "X" was declared to be Native Area Land with effect from the 19th November, 1954.

c. By virtue of Swk L.N. 26 of 1997 made on the 24th April, 1997 and published in the Sarawak Government Gazette on the 7th May 1997, the said Lands were classified as Mixed Zone Land with effect from the 24th April, 1997.

6. The Plaintiffs have no subsisting document of title to the LAND.

7. Part of the LAND overlaps with Lot 591 (hereinafter referred to as "the Overlapping Area"). The Overlapping Area is shaded orange as shown in the map annexed hereto and marked as "X".

8. Forest Timber Licence No. T/0283 was issued over, *inter alia*, the Overlapping Area from 10th November, 1080 until 1st September, 1997. Subsequently, Forest Timber Licence No. T/4314 was issued over, inter alia, the Overlapping Area from the 2nd September, 1997. Both Forest Licences Nos. T/0283 and T/4314 shall hereinafter collectively be referred to as "the aforesaid Timber Licences". The areas covered by the aforesaid Timber Licences are as shown in the map annexed hereto and marked as "Y".

9. Logging operation were undertaken over the Overlapping Area by the licencees of the aforesaid Timber Licences, their servant(s), agent(s) and/or contractors.

10. The aforesaid Forest Timber Licences were issued subject to the provisions of the Forest Ordinance Cap. 126 and the conditions as stated therein.

11. The 1st and 2nd Defendants, their servants and/or agents have carried out clearing activities on certain parts of the Overlapping Area.

12. None of the 1st and 2nd Defendants, their servants and/or agents have carried out any activities or undertook any work outside the boundaries of the said Lands.

13. The 1st and 2nd Defendants intend to carry out further clearing activities and plant trees on the said Lands in accordance with the restrictions and special conditions indorsed on the respective documents of title to the provisional leases of the said Lands.

Dated this 26th day of October, 2000

Only for the purpose of understanding the location of the Disputed Area it is reproduced the map inserted in the judgment of the court below.

The Disputed Area shown in the map above is referred to in the statement of agreed facts as the Overlapping Area in Lot 591.

It is to be noted that the Disputed Area is only a portion of the area of land claimed by the respondents to be under native customary rights. In term of acreage the total area claimed by the respondents to be under the native customary right is 18,952 acres while the Disputed Area is 1,725 acres. The balance of 17,227 acres is not contested by the appellants as being under native customary rights. It was also disclosed that only a Provisional Lease was issued to the 1st appellant in the second appeal for Lot 591 in which the Disputed Area overlaps.

* *[Editor's note: The photograph of the Disputed Area has been removed by the editors of the CLJ]*

Further the Disputed Area *vis-à-vis* the alienated land is located in the District of Sekabai, Bintulu. Under the Land (Classification) Ordinance 1948 it was categorized under the class of land called Interior Area Land before it was declared to be Native Area Land in 1954.

The action commenced by the respondents was in the nature of a representative action. The primary contention of the respondents in staking their claim on the Disputed Area is that they have acquired native customary rights over the said area. The claim against the second appellant in the second appeal is that it had trespassed and damaged the Disputed Area due to the presence of contractors engaged to clear the area.

The Agreed Issues To Be Tried

The parties also agreed on the issues to be tried before the learned judge in the court below. They were as follows:

1. Whether the plaintiffs and those whom they claim to represent are Ibans and natives of Sarawak?

2. Whether the plaintiffs are entitled to claim that they are bringing this action on behalf of:

   (a) the residents of the longhouse known as Rumah Luang/Rumah Nor, Sungai Sekabai, Sebauh, Bintulu Division, Sarawak?

   (b) all other occupiers, holders and claimants of native customary land at Sungai Sekabai, Sungai Tajem, Sungai Ipuh, Sebauh, Bintulu Division?

3.1 If the answer to paragraphs 2(a) and (b) above are both positive, whether the Overlapping Area (as defined in the Statement of Agreed Facts herein) comprises:

   (i) "Temuda"

   (ii) "pulau" and

   (iii) "pemakai menoa"?

   If the answer to paragraphs 3.1 (i), (ii) and (iii) are positive, whether native customary rights could, in the circumstances of this case, be created over the land described as "temuda" or "pulau" or "pemakai menoa"?

3.2 If the answer to paragraph 3.1 is positive, whether the Plaintiffs and those whom they claim to represent had lawfully acquired any native customary rights over the Overlapping Area (as defined in the Statement of Agreed Facts herein)?

4. Even if the Plaintiffs and those whom they claim to represent have acquired native customary rights over the Overlapping Area, whether such rights had been abandoned, lost, waived and/or extinguished?

5. Whether the 1st and 2nd Defendants and/or their agents and/or servants did wrongfully trespass onto the Overlapping Area and cleared and/or damaged a very substantial portion of the Overlapping Area to the extent as pleaded in paragraph 9 of the Statement of Claim, including the particulars of damages stated therein?

6. Whether any or all of the Defendants are liable to the Plaintiffs and those whom they claim to represent?

7. Whether the Plaintiffs and those whom they claim to represent are entitled to any or all of the reliefs as prayed for in the Statement of Claim?

8. Whether the Plaintiffs and those whom they claim to represent had occupied the Overlapping Area?

9. If the answer to paragraph 8 is positive, are the Plaintiffs and those whom they claim to represent still in occupation of the Overlapping Area?

10. Whether the 1st and 2nd Defendants are entitled to any or all of the reliefs as prayed for in the Amended Counterclaim of the 1st and 2nd Defendants filed herein?

Dated this 26th day of October, 2000

We also note that there is no dispute on the meanings of the relevant Iban terminologies as recorded by the learned judge. Thus, 'pemakai menoa' is a term given to an area of land selected by pioneers of a longhouse community who are usually related to each other for the construction of 'a longhouse with sufficient rooms arranged in a row, all joined together to accommodate the families'. And the longhouse will 'just expand to with new families'. And it is within the 'pemakai menoa' that the longhouse community will establish 'temuda' which is an area of land accessible for farming and 'pulau' or 'pulau galau' which is the forest area where there may be rivers for fishing and the jungles for gathering of forest produce. The other Iban terms are 'tembawai' for old longhouse site; 'tanah umai' for cultivated land within 'pemakai menoa' and 'pendam' is cemetery. However 'pemakai menoa' has its boundary usually based on streams, watersheds, ridges and permanent landmarks, separating it from another longhouse community.

The Judgment Of The High Court

The learned judge in the court below answered in affirmative items 1 to 8 of the agreed issues to be tried. In respect of issue 9 there was no specific finding save it was noted that the evidence adduced by the respondents was that since trees had been planted on the Disputed Area there was no longer any planting of padi, hunting for wild boars, fishing and collection of rattan in the area. This is the finding in which the respondents are cross-appealing contending that it should have been followed with an order to assess damages. As for

issue 10 it was the conclusion of the learned judge that he was not satisfied that the appellants in the second appeal had proved any damage suffered as alleged. He added however that even if judgment should be entered for the appellants he would award a nominal sum of RM10.

Briefly the findings of the learned judge may be summarized as follows:

(a) that from the evidence adduced the respondents had established their native customary rights over the Disputed Area;

(b) that such rights have not been abolished by any of the legislations as enacted by the State of Sarawak;

(c) that the Disputed Area was alienated to the first appellant in the second appeal without the respondents being heard of their claim of native customary rights over it; and

(d) that even if he was wrong in his finding, he was not satisfied that in their counter-claim the appellants in the second appeal had suffered any damage arising from the claim made by the respondents and thus limited the quantum of damages to RM10 so as to peg the costs to be awarded against the respondents.

The Appeals – The Grounds

The appellants in these appeals being dissatisfied with the findings and conclusions of the learned judge are thus appealing to this court on various grounds, *inter alia:*

(a) In the first appeal

i. that it was wrong for the learned judge to equate native customary rights with 'temuda', 'pulau' and 'pemakai menoa';

ii. that only 'temuda' land are native customary land or land held under native customary rights;

iii. that the Disputed Area was Interior Area Land and not native customary land. After it was declared Native Area Land in 1954 it could not have been occupied by the respondents without title;

iv. that it was not considered whether the relevant statutes and orders had modified the customs and practices including those on land, existing before the era of the Rajahs' rule;

v. that it was wrong to invalidate the Provisional Lease issued by the appellant;

vi. that the appellant disputes the finding of fact that the respondents or their ancestors had lawfully acquired native customary rights over the Disputed Area;

vii. that the Disputed Area was never farmed by the respondents or their ancestors before 1958; and

viii. that it was wrong to come to a finding that although the aerial photographs taken of the Disputed Area in 1951 show that the area was covered with jungles or primary forests, there was a possibility that the Disputed Area was cleared years ago and planted with trees that grew to become the jungles as shown in the 1951 photographs.

(b) In the second appeal

i. Errors of law were committed by the learned judge, in that, *inter alia*:

(a) he failed to distinguish between 'native customary rights' over land or 'native customary land', 'native customary law' and 'native customs';

(b) he failed to distinguish between native customary rights or title to land in Sarawak and common law rights generally;

(c) he failed to note that the matter before him was for the adjudication of native customary rights and not on the issue of common law rights;

(d) he failed to consider or misconstrue the implications of the various statutes and orders passed in relation to the Disputed Area;

(e) he failed to consider that based on the various orders of the Rajah rights to land could only be established by a native who had cleared it of primary/virgin jungle for the purpose of farming or cultivation (ie, 'temuda') and that the practice of other native customs confers no native customary rights to or over land;

(f) he failed to consider or misconstrued the relevant provisions of the applicable legislations thereby concluding that 'pemakai menoa', 'pulau' and the activities of hunting, fishing and collection of jungle produce are 'native customary rights' in Sarawak;

(g) he failed to take into account the testimonies of some of the witnesses while unjustifiably relying upon comments of some academic writers and testimonies of some witnesses when the same were either unsubstantiated or inconsistent with the law; and

(h) he erroneously interpret and apply the relevant statutory provisions to the disputes before him.

ii. Native customary rights, *inter alia*

(a) the learned judge failed to consider that native customary rights refers to 'temuda', burial grounds and land used as rights of way; and

(b) the learned judge failed to consider that in the various orders issued by the Rajah or with his sanction there were no mention of 'pemakai menoa' or 'pulau' and thus should have held that such practices were not part of the customary law of Sarawak during and after the colonial period.

iii. The Disputed Area

(a) the learned judge failed to consider that there was no 'temuda' rights or 'pulau' established in the Disputed Area and that the longhouses of the respondents are outside the Disputed Area and the Provisional Leases issued to the 1st appellant;

(b) that even if there was 'temuda' earlier on in the Disputed Area it was abandoned;

(c) that even if there was native customary rights over the Disputed Area the same had been extinguished since the respondents and/or their ancestors had allowed non natives to carry out logging activities therein; and

(d) that the learned judge was too preoccupied with the survival of the native customary rights instead of the statutes and orders that could have modified or amended them.

iv. The learned judge erred in inferring that loss of native customary rights over the Disputed Area would tantamount to a 'loss of livelihood' of the respondents when no evidence was adduced to that effect while the undisputed area of 'temuda' rights would be able to sustain their livelihood;

v. The learned judge took into account irrelevant matters such as the policies of the Government in tree plantation, employment of immigrant workers and of his undue concern of the Ibans being 'vagabonds in their own land';

vi. The learned judge erred in making two inconsistent orders in that on the one hand he declared the provisional lease issued to the 1st appellant as void while on the other hand he ordered rectification; and

vii. The learned judge erred in disregarding the evidence adduced by the 2nd appellant in support of its claims.

We will deal with the cross-appeal later and if necessary.

The Contentions

At the outset of the hearing we asked Datuk Fong the learned State Attorney General of Sarawak representing the appellant in the first appeal on the position of the area outside the Disputed Area but within the area claimed by the respondents to be under the native customary rights. His reply was that the area passed the test for native customary rights. However he went on to qualify by saying that, *inter alia*,:

a. for the Disputed Area to be under native customary rights it must be recognized by statute;

b. the learned judge erred in interpreting and construing the various relevant statutes and orders as he failed to take into account the circumstances of this case when he considered the status of the Disputed Area;

c. the only method to establish native customary rights was through 'temuda' and not simply by roaming or foraging an area of the jungles;

d. the terms ‘Pulau’ and ‘Pemakai Menoa’ did not appear in any of the statutes which gave recognition to native customary rights;

e. the approach of the learned judge in the court below was flawed when he directed his mind by saying that the ‘plaintiffs claimed that they have acquired native customary rights, described in the Iban language as temuda, pulau and pemakai menoa, over certain part of the lands’ and then proceeded to make a conclusion instead of addressing the agreed issue to be tried, namely, whether native customary rights comprises of ‘temuda’, ‘pulau’ or ‘pemakai menua’;

f. in respect of ‘pulau’ no propriety rights could be acquired by such mode and more so in this case since the area was logged twice before the Provisional Lease for Lot 591 was issued;

g. on the evidential aspect the learned judge did not make any finding of fact that the respondents or their ancestors cultivated or had built longhouses in the Disputed Area; and

h. it was erroneous for the learned judge to declare as void the whole of the Provisional Lease granted to the 1st appellant in the second appeal when the Disputed Area was only a portion of the area alienated. The area could have been excised.

Mr. Tan, learned counsel for the appellants in the second appeal adopted wholly the submission of Dato Fong. His only other point was on the failure of the learned judge to consider the applicable law in relation to native customary rights then existing when the ancestors of respondent moved from the third Division to the fourth Division of Sarawak in the 1930s as found by the learned judge. It was Mr. Tan's submission that the applicable law then in relation to creation of native customary rights would have been s. 66 of Land Settlement Ordinance 1933 and s. 8(3) and (4) of Land Classification Ordinance 1948 as amended by Ordinance No. 1 of 1955.

In answer to the submissions of learned counsel for the appellants Mr. Baru, learned counsel for the respondents contended that within the Disputed Area there were 'pulau' and 'temuda' and that the whole area claimed including the Disputed Area was under 'pemakai menoa'.

Mr. Baru also argued that since it was the finding of the learned judge that the ancestors of the respondents were in the Sebakai area by the latest in 1930, the applicable law would have been the common law and thus acquiring native customary rights through the practice of 'pemakai menoa' and 'pulau'. Learned counsel submitted that the Land Classification Ordinance 1948 or the Land Settlement Ordinance 1933 were not applicable.

Determination By This Court

Having read the grounds of these appeals and having heard the submissions advanced by the respective counsel of the parties in our view it is simply an issue of whether the Disputed Area should be excluded from the area claimed by the respondents to be under native customary rights and not contested by the appellants. Basically therefore it is a matter of proof based on the evidence adduced and the application of the relevant statutory provisions, if any, on whether the Disputed Area has the requirements to be under native customary rights as accorded to the uncontested area. Indeed in *The Wik Peoples v. Queensland* (1996-97) 187 CLJR 1 such an approach was adopted since 'native title rights necessarily involve some factual inquiry, as they are peculiar to the particular area of exercise'.

Anyway, before going into the specifics perhaps it may be useful to remind ourselves of the current judicial views on the meaning or scope of the term 'native customary rights' or 'native rights' in relation to land.

We note that in the appeals before us the learned judge only gave instances in the establishment of native customary rights in Sarawak when he referred to the practices of 'pemakai menoa' 'temuda' and 'pulau' amongst the natives there.

Claim for native rights is not a novel subject. In our own courts this issue has been adjudicated. In *Adong bin Kuwau & Ors v. Kerajaan Negeri Johor & Anor* [1997] 1 MLJ 418 the learned trial judge said, *inter alia*, at p. 430:

> the aboriginal peoples' rights over the land include the right to move freely about their land, without any form of disturbance or interference and also to live from the produce of the land itself, but not to the land itself in the modern sense that the aborigines can convey, lease out, rent out the land or any produce therein since they have been in continuous and unbroken occupation and/or enjoyment of the rights of the land from time immemorial…. In Malaysia the aborigines' common law rights include, *inter alia*, the right to live on their land as their forefathers had lived and this would mean that even the future generations of the aboriginal people would be entitled to this right of their forefathers.

The foregoing view was affirmed by this court in *Kerajaan Negeri Johor & Anor v. Adong bin Kuwau & Ors* [1998] 2 CLJ 665 in that common law recognizes native customary rights.

Another view on the subject was expressed in the High Court case of *Sagong bin Tasi & Ors v. Kerajaan Negeri Selangor & Ors* [2002] 2 CLJ 543 in which the trial judge appears to have given some indication on the limit to such claim when he said this at p. 565:

> I follow the *Adong* case, and in addition, by reason of the fact of settlement, I am of the opinion that based on my findings of facts in this case, in particular on their culture relating to land and their customs on inheritance, not only do they have the right over the land but also an interest in the land. I am fortified in my view by the leading Privy Council case of *Amodu Tijani v. the Secretary, Southern Nigeria* [1921] 2 AC 399 ('the *Amodu* case'), which was relied on by the High Court in the *Adong* case though the issue of settlement did not arise in the case.
>
> …
>
> Accordingly, the Privy Council relied upon a report onthe character of the tenure of land among the native communities in West Africa which stated that all members of the native community had an equal right to the land although the headman or the head of the family had charge of the land, and in loose mode of speech is sometimes called the owner who held the land for the use of the community or family, and the land remained the property of the community or family. The same can be said of the character of land tenure and use amongst the Temuan people based on the facts as found. Further, the character of proprietary interest of the aboriginal people in their land as an interest in land and not merely an usufructuary right can be gathered from the following features of the native title as decided by the courts:

(a) it is a right acquired in law and not based on any document of title (see the Calder case, followed in the *Adong* case at p 428F);

(b) it does not require any conduct by any person to complete it, nor does it depend upon any legislative, executive or judicial declaration (see Brennan CJ in *The Wik Peoples v. The State of Queensland & Ors* [1996] 187 CLR 1 ('the *Wik Peoples* case') at p 84, followed in the Malaysian case of *Nor Anak Nyawai & Ors v. Borneo Pulp Plantation Sdn Bhd & Ors* [2001] 2 CLJ 769 at p 780);

(c) native title is a right enforceable by the courts (see Brennan CJ in the *Wik Peoples* case at p 84);

(d) native title and interest in aboriginal land is not lost by colonization, instead the radical title held by the sovereign becomes encumbered with native rights in respect of the aboriginal land (see *Mabo No 2*, headnotes at p 2);

(e) native title can be extinguished by clear and plain legislation or by an executive act authorized by such legislation, but compensation should be paid (see *Mabo No 2*, headnotes at p 3); and

(f) the aboriginal people do not become trespassers in their own lands by the establishment of a colony or sovereignty (see *Ward & Ors (on behalf of the Miriuwung and Gajerrong People & Ors v. State of Western Australia & Ors* [1998] 159 ALR 483 at p 498, lines 43-45).

Therefore, in keeping with the worldwide recognition now being given to aboriginal rights, I conclude that the proprietary interest of the orang asli in their customary and ancestral lands is an interest in and to the land. *However, this conclusion is limited only to the area that forms their settlement, but not to the jungles at large where they used to roam to forage for their livelihood in accordance with their tradition. As to the area of the settlement and its size, it is a question of fact in each case. In this case, as the land is clearly within their settlement, I hold that the plaintiffs' proprietary interest in it is an interest in and to the land.* (emphasis added).

From the above two cases we note that the common feature which forms the basis of claim for native customary rights is the continuous occupation of land. Further, we are inclined to agree with the view of the learned trial judge in *Sagong bin Tasi & Ors (supra)* that the claim should not be extended to areas where 'they used to roam to forage for their livelihood in accordance with their tradition'. Such view is logical as otherwise it may mean that vast areas of land could be under native customary rights simply through assertions by some natives that they and their ancestors had roamed or foraged the areas in search for food. We note that even Mr. Baru in his submission hinged the

claim of the respondents over the Disputed Area on the assertion that they 'had been in continuous occupation and by express provisions of the law at the relevant time, been lawfully occupying the Disputed Area'. It is thus a matter of evidence adduced whether his submission can be sustained.

The approach adopted by our courts is consistent with the views expressed by some of the courts in other jurisdictions. In *Mabo (No 2)* [1992] 175 CLR 1 it was accepted that the 'Meriam people were in occupation of the Murray Islands for generations before the first European contact'. And in *R. v. Van der Peet* [1996] 2 SCR 507, 137 DLR (4th) 289 Lamer CJ opined that both 'aboriginal title and aboriginal rights arise from the existence of distinctive aboriginal communities occupying the land as their forefathers had done for centuries'. (See also: *Western Australia v. Ward; Attorney-General (NT) v. Ward; Ningarmara v. Northern Territory* [2002] HCA 28; *Calder v. A-G (British Columbia)* [1973] SCR 313; 34 DLR; *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823) and *Worcester v. State of Georgia*, 31 U.S. (6 Pet.) 515 (1832).

In respect of the other expositions of the law by the learned judge in relation to native customary rights we are inclined to endorse them. And briefly they are as follows:

a. that the common law respects the pre-existence of rights under native laws or customs though such rights may be taken away by clear and unambiguous words in a legislation;

b. that native customary rights do not owe their existence to statutes. They exist long before any legislation and the legislation is only relevant to determine how much of those native customary rights have been extinguished;

c. that the Sarawak Land Code 'does not abrogate whatever native customary rights that exist before the passing of that legislation'. However natives are no longer able to claim new territory without a permit under s. 10 of that legislation from the Superintendent of Lands & Surveys'; and

d. that although the natives may not hold any title to the land and may be termed licencees, such licence 'cannot be terminable at will. Theirs are native customary rights which can only be extinguished in accordance with the laws and this is after payment of compensation'.

Reverting now to determine the present appeals we note that the learned judge made some crucial findings in relation to the Disputed Area upon which he came to his conclusions, namely:

a. that the ancestors of the respondents were at Sekabai area by the latest in 1930 but it could be much further back than the year 1930;

b. that the Sebakai river has many tributaries such as the rivers of Ipuh, Tajem, Semerah, Pantu, Anyie and Naing;

c. that no 'temuda' was found in the upper reaches of rivers Tajem and Anyie which is within the Disputed Area but they were still within the 'pemakai menoa';

d. that 'the proximity of the present longhouse and of all the said 'tembawai' to the Disputed Area 'definitely lend support to those tributaries, namely the rivers Tajem, Semerah, Pantu, Anyie, and the surrounding jungles having been accessed before for farming, for fishing, for hunting and for gathering of forest produce'. There is also evidence that the respondents and, 'at least their more immediate ancestors, have planted fruit trees along the northern end' of the Disputed Area. 'The growing fruit trees are living testimony of that'. All these support the respondents' assertion that they have farmed, fished and hunted in the Disputed Area;

e. that since the respondents were so near to the rivers and to the surrounding forests in the Disputed Area, 'it is inconceivable that the past and present folks of longhouse Nor did not fish in those rivers or that they did not forage in the jungles for produce or hunt there for food';

f. that 'it cannot be the law that if a native sells the timber from a forest over which he together with other longhouse folks has a right to fell for his own use the longhouse folks would lose their native customary rights in that forest';

g. that the distance of the Disputed Area, 'even at the furthest point, from the longhouse does not rule out the possibility' of the respondents and their ancestors 'having gone there to exercise their native customary rights, if not also to clear land for cultivation, at least to fish, to collect forest produce and to hunt for animals'. Thus, native customary rights were exercised by the respondents and their ancestors in the Disputed Area;

h. that the aerial photographs of the Disputed Area in 1951 showed jungles but it would not mean that the jungles 'could not have been cleared years ago and planted with trees that grew to become the jungle'. Though there is no direct evidence of that probability, there is evidence that the Disputed Area was 'accessed by the previous and present folks of longhouse Nor and their ancestors';

i. that the Disputed Area 'is within the boundary of the 'pemakai menoa'' of the respondents on the basis of:

   a. the map produced by the respondents through one Samy, an unqualified surveyor;

   b. the fruit trees planted by the respondents and their ancestors were found next to the trees planted by the second appellant in the second appeal;

   c. 'the ground features in the form of the said trees and the various mountains, ridges and rivers certainly help to identify and locate the areas' which the respondents had described and to which the respondents and their ancestors had accessed for fishing, hunting and the collection of forest produce'; and

   d. the proximity of the rivers mentioned and of the surrounding jungles to longhouse Nor and the 'tembawai' render it probable and support the assertion that the respondents and their ancestors had accessed these rivers and forests'; and

j. that on a balance of probabilities the Disputed Area (as shown in the map P172) was the area where the respondents and their ancestors had cleared for cultivation, accessed for fishing, hunting and to gather forest produce, all rights associated with 'temuda' and 'galau' and they fall within the 'pemakai menoa' of the respondents.

The question therefore is whether the learned judge was factually correct based on the evidence adduced.

Despite the aerial photographs of the Disputed Area in 1951 showing the Disputed Area covered with jungles the learned judge factually concluded that on a balance of probabilities the Disputed Area was the area where the respondents and their ancestors had cleared for cultivation, accessed for fishing, hunting and to gather forest produce, all rights associated with 'temuda' and 'galau' and they came within the 'pemakai menoa' of the respondents. Such finding was also made in complete disregard to the unchallenged testimony of Sapit who said that there was no 'temuda' in the upper reaches of Tajem and Anyie rivers. And to justify his finding in the face of the physical evidence in the form of the photographs of the Disputed Area in 1951 the learned judge proceeded to agree with the assumption advanced by Mr. Baru in that the area could have been cultivated before 1951 only to return to jungles subsequently. Unfortunately credible supporting evidence was lacking for such assumption. Hence, with respect, we are unable to agree with the approach taken by the

learned judge. We are inclined to accept, in the absence of any evidence to the contrary, that at the relevant time the Disputed Area was covered with jungles as shown in the 1951 photographs. And at the appellate level we are entitled to do so since such finding of the learned judge is not a primary finding of fact but an inference at most. (See: *Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen and Ors* [1998] 1 CLJ 793; *China Airlines Ltd. v. Maltran Air Corp. Sdn. Bhd.* [1996] 3 CLJ 163; *Anvest v. Wong Siew Chong* [1998] 2 CLJ 245).

There was also no evidence adduced to show that the Disputed Area was in fact under continuous occupation by the respondents and their ancestors. The contrary may be true. Firstly, there was no challenge to the testimony of Sapit that there was no 'temuda' in the area. Secondly, the longhouses of the respondents were situated outside the area. Thirdly, the learned judge failed to consider what the trial judge in *Mabo & Ors v. State of Queensland & Anor* [1986] 64 ALR 1 did in that he recorded that Eddie Mabo lacked credibility and that he would not accept his evidence on any matter going to self-interest, save if corroborated by other credible evidence. In the present case under appeals there were also self-serving testimonies by some of the respondents which should carry little or no weight in the absence of some other credible corroborative evidence. There is also no credible corroborative evidence to indicate that there was 'pulau' in the area or that the area was considered as 'pulau' by the respondents or their ancestors.

We also note that in order to justify his conclusion that the area must have been foraged by the respondents and their ancestors for food including fishing, the learned judge undertook a theoretical exercise. He gave an approximate distance of the area from the furthest longhouse of the respondents and estimated the time taken to walk there.

As to whether the respondents and their ancestors in fact went to the area to forage for food remained unanswered. At any rate it should not be answered with an assumption as was done by the learned judge. Otherwise it can also be assumed that in the early days the respondents and their ancestors were not interested in the area at all. In any event and as we noted hereinabove there was no evidence adduced to indicate that the Disputed Area was within the territorial domain of the longhouses of the respondents or their ancestors. Even the 'tembawai' found were not within the Disputed Area. Hence, to say that the area was within the 'pemakai menoa' of the respondents without any credible evidence to support it would therefore be factually erroneous.

On the basis that the Disputed Area was covered with jungles in 1951, with no evidence of 'temuda' or 'pulau' or 'pemakai menoa' having been credibly established, in the circumstances of this case under appeals, the claim for the area to be under native customary rights is a non-starter. And it follows that the issues of which statute is applicable or whether the area was abandoned do not arise. Having said that we must hasten to add that this case should not necessarily be a precedent for other potential claims where proof may be readily available. Further, in view of the conclusions which we have arrived at we do not think it is necessary for us to address the other points raised in these appeals.

These appeals are therefore allowed and all the orders rendered by the High Court are hereby set aside. The cross-appeal is hereby dismissed. In effect therefore the action of the respondents stands dismissed.

Now in respect of the counter-claim by the appellants in the second appeal which was dismissed by the court below, we are inclined to agree with the learned judge. It was not in dispute that the area had already been entered by the second appellant in the second appeal and had planted trees. The issue of the area being occupied by the respondents should not therefore arise.

As for costs of these appeals and in the court below, in the exercise of our discretion we would order that each party pays its own costs here and below. We take such a course in view of this case being one of public interest in nature. Moreover it is not in dispute that the respondents are persons of little means. Thus, to award costs against them could be an economic catastrophe for them and their families. Deposits for these appeals are to be refunded to the respective appellants.